

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ONEZIME GOBERT,

Defendant and Appellant.

B288426

Los Angeles County
Super. Ct. No. SA093872

APPEAL from a judgment of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed in part, sentence vacated, and remanded with directions.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Onezime Gobert was convicted of attempted robbery, criminal threats, elder abuse, and possession of a firearm and ammunition by a felon after threatening to kill his landlord—for whom he worked as a caretaker—and the landlord’s son. The court imposed an 11-year prison sentence, stayed execution of the sentence, and granted defendant 11 years’ probation. We vacate defendant’s sentence and remand for the trial court to exercise its newly-acquired discretion under Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2). In all other respects, we affirm.

PROCEDURAL BACKGROUND

By information filed December 29, 2016, and amended by interlineation August 9, 2017, defendant was charged with attempted first degree robbery (Pen. Code,¹ § 664/211; count 1), criminal threats (§ 422, subd. (a); counts 2, 4), elder abuse (§ 368, subd. (b)(1); count 3), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5), and possession of ammunition by a felon (§ 30305, subd. (a)(1); count 6). The information alleged that defendant had a 2007 assault conviction (§ 245, subd. (a)(1)) that constituted a strike prior (§ 667, subds. (b)–(j); § 1170.12), a serious-felony prior (§ 667, subd. (a)), and the predicate for counts 5 and 6. It also alleged, as to count 1, that the victim was elderly (§ 667.9, subd. (a)) and as to counts 3 and 4, that defendant

¹ All undesignated statutory references are to the Penal Code.

personally used a handgun in the commission of the offenses (§ 12022.5, subd. (a)).²

Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he did not testify, a jury convicted defendant of the charged crimes but found the conduct allegations not true. While the jurors deliberated, defendant waived jury trial on the prior conviction; he later admitted it.

The court granted defendant's motion to dismiss his strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, but the court was bothered that, because it could not also strike the serious-felony prior (§ 667, subd. (a)), defendant's minimum possible sentence was six years four months in state prison.

So the court offered defendant a choice: take the minimum prison term and retain his 556 days of accrued custody credit or waive the custody credit and serve 11 years' probation under "egregious conditions." If defendant violated probation, he would receive the maximum possible prison term. Defendant chose probation.

The court imposed an aggregate term of 11 years in state prison. The court selected count 3 (§ 368, subd. (b)(1)) as the base term and imposed nine years—the high term of four years plus five years for the serious-felony prior (§ 667, subd. (a)). The court imposed eight months—one-third the midterm of two years—for each of counts 2 (§ 422, subd. (a)), 5 (§ 29800, subd. (a)(1)), and 6 (§ 30305, subd. (a)(1)), to run consecutively to count 3 and each

² The court later granted defendant's motion to dismiss the elderly-victim allegation, because that allegation applies only to the completed crime, not an attempt.

other. The court imposed the high term of three years for count 1 (§ 664/211) and count 4 (§ 422, subd. (a)), then stayed those sentences under section 654.

The court found that this was an unusual case under section 1203, subdivision (e)(2), (4), and (6), suspended execution of the 11-year sentence, and placed defendant on probation for 11 years—but agreed to terminate probation after seven years if defendant did not have any probation violations. Defendant waived 556 days of custody credit.

Defendant filed a timely notice of appeal, and we appointed counsel to represent him. On October 3, 2018, appointed counsel filed a brief in which she raised no issues and asked us to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.)

After reviewing the record and exhibits in this case, we asked defense counsel and the People to address three issues:

- Did defendant stipulate to the prior felony conviction for purposes of count 6?³
- Should we remand this matter to allow the trial court to decide whether to strike the serious-felony prior under Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2)?
- Did the court err by imposing both a probation revocation restitution fine (§ 1202.44) *and* a parole revocation restitution fine (§ 1202.45)?

³ As the parties agree that defendant’s stipulation applied to both counts 5 and 6, we do not address this issue further.

FACTUAL BACKGROUND

Joe Allan Gardner lived with his son Alvin Gardner, Alvin's three children, defendant, and defendant's son.⁴

Gardner was 67 years old and suffered from Parkinson's disease, which caused an equilibrium problem, and "a little dementia." Defendant was Gardner's caretaker: He prepared Gardner's meals, drove him wherever he needed to go, performed work around the house, and helped Gardner with his exercises. Gardner paid defendant whenever defendant asked for money.

Around midnight on September 11, 2016, defendant came home angry; he was talking loudly. Alvin was in his bedroom talking on the phone. Defendant kicked the bedroom door open, entered the room, and tried to grab the phone. He took a swing at Alvin, who punched back.

Gardner entered the room. As he escorted defendant out, defendant screamed that he was going to shoot Alvin and kill everyone in the house.

When they reached the hallway, defendant tried to take something off a table. Gardner told him not to take the item, and defendant pushed Gardner to the ground.

Gardner returned to his bedroom. At some point, defendant entered and asked Gardner for his credit card; defendant needed \$40. Gardner gave defendant the credit card and PIN. In his initial testimony, Gardner testified that defendant did not threaten him, and promised to return with the ATM receipt. In subsequent testimony, however, Gardner agreed that he had told

⁴ Because they have the same last name, we refer to Joe Allan Gardner as Gardner and refer to Alvin Gardner as Alvin.

the police that he turned over the card after defendant threatened to kill him and Alvin.

Defendant left the house. He returned 15 minutes later.

Meanwhile, Gardner's Life Alert pendant had summoned law enforcement. Gardner went outside to talk to the officers, and defendant followed soon thereafter.

DISCUSSION

1. Remand is required.

In response to our request for supplemental briefing, defendant contends we must remand for the trial court to exercise its newly-acquired sentencing discretion under Senate Bill No. 1393. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); Stats. 2018, ch. 1013, §§ 1–2.) The People properly concede the point, and we agree.

When defendant was sentenced in this case, the court had no discretion “ ‘to strike any prior conviction of a serious felony for purposes of enhancement [of a sentence] under Section 667.’ ” (§ 1385, subd. (b); *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116–1117.) Thus, though the court could (and did) strike defendant's prior strike under *Romero, supra*, 13 Cal.4th 497, it imposed a five-year enhancement for the same prior conviction under section 667, subdivision (a).

After defendant filed the no-issue brief in this appeal, the California Legislature passed, and the Governor signed, Senate Bill No. 1393, which went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); *People v. Camba* (1996) 50 Cal.App.4th 857, 865 [effective date of non-urgency legislation].) The bill amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike

or dismiss a serious-felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 is “ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) As such, Senate Bill No. 1393 applies retroactively to all cases, such as this one, that were not final when it took effect. (*Garcia*, at p. 973.)

As the People concede, defendant’s sentence must be vacated and the matter remanded to afford the court an opportunity to exercise its new discretion under the amended statutes. (See *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255 [at remand hearing, defendant has the right to the assistance of counsel and the right to be present].)

2. Parole Revocation Restitution Fine

We also asked the parties to address whether the court properly imposed and stayed both a probation revocation restitution fine (§ 1202.44) *and* a parole revocation restitution fine (§ 1202.45), an issue on which the appellate courts have long disagreed. (Compare *People v. Hunt* (2013) 213 Cal.App.4th 13 with *People v. Preston* (2015) 239 Cal.App.4th 415.)

Because the court may decide not to impose both fines upon resentencing, however, we conclude this issue should be raised in the trial court in the first instance. At the remand hearing, defendant may also raise, and the court may consider, defendant’s ability to pay fines and court fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. Nothing in this opinion should be construed as expressing any view about how the court should exercise its discretion on remand. In all other respects, we affirm.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.